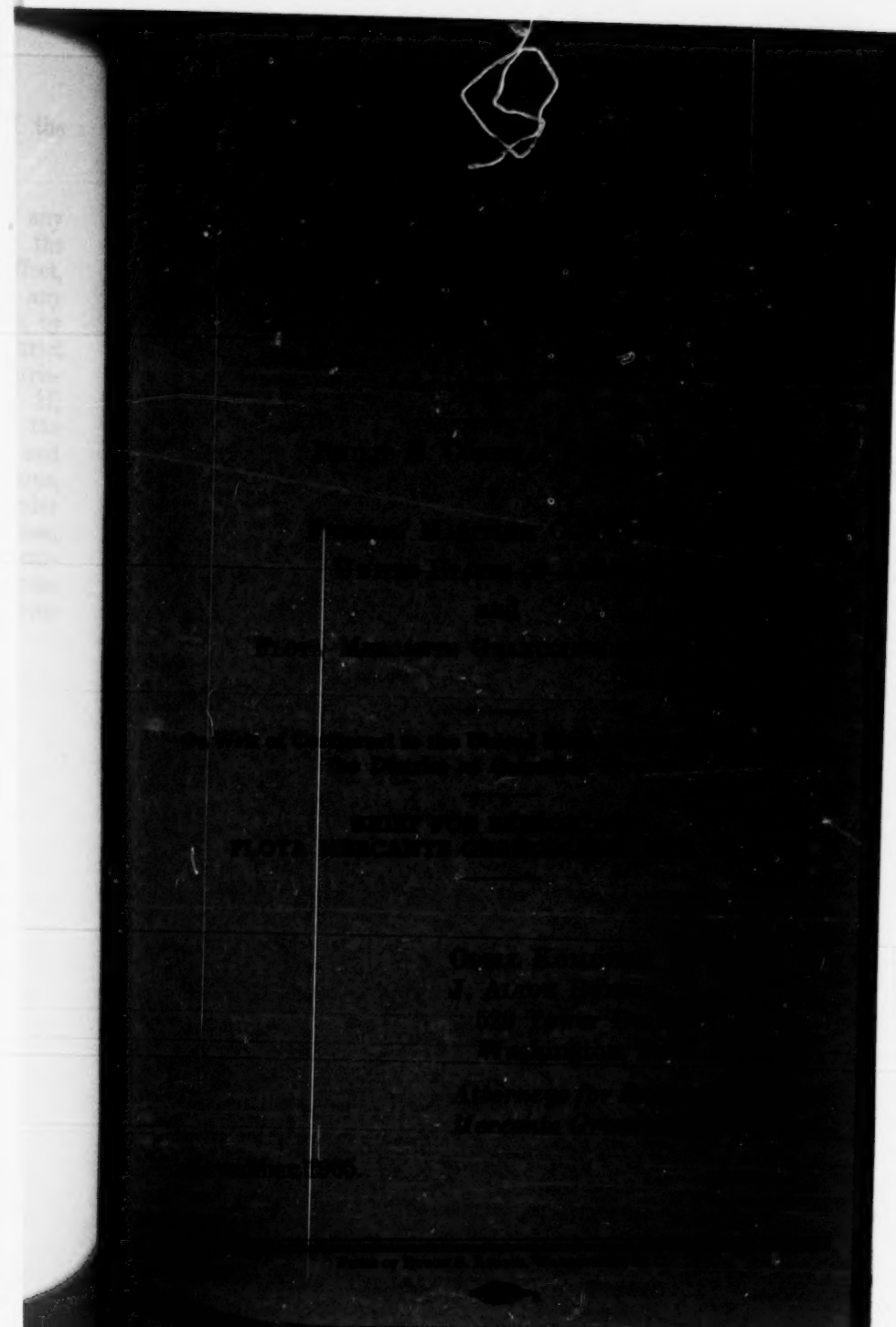

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STATUTES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION

UNITED STATES OF AMERICA

and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT FLOTA MERCANTE GRANCOLOMBIANA, S. A.

OPINIONS BELOW

The opinion of the Court of Appeals on the judgment under review is reported at 342 F. 2d 924 (C.A.-D.C. 1964) (R. 686-98). The previous opinion of that court, remanding the case to the Federal Maritime

Commission,[1] is reported at 302 F. 2d 887 (1962) (R. 651-59). The two opinions of the Federal Maritime Board prior to the first decision of the Court of Appeals, are reported at 5 F.M.B. 633 (1959) (R. 1-13), and at 6 F.M.B. 262 (1961) (R. 265-81). The opinion and order of the Federal Maritime Commission, which the Court of Appeals set aside in the action here under review, is reported at 7 F.M.C. 635 (1963) (R. 500-514).

JURISDICTION

The judgment of the Court of Appeals under review was entered on December 17, 1964 (R. 699). The petition for writ of certiorari was filed on March 16, 1965, and granted on June 1, 1965 (R. 700), 381 U.S. 933. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 5 U.S.C. § 1040.

QUESTIONS PRESENTED

1. Where the Court of Appeals had jurisdiction under the Hobbs Act, of (a) a carrier's petition to review a finding of violation of the Shipping Act, to the extent that it served as a basis for a reparations order against the carrier, and (b) the shipper's petition to review the reparations order, in an effort to increase the amount thereof, whether that court also had jurisdiction to determine the validity of the same reparations order upon challenge by the carrier?

2. Whether the Maritime Commission is required mechanically to award reparations for a period in which the law was unsettled and the carrier was actively

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[1] The Federal Maritime Commission succeeded to the relevant functions and duties of the Federal Maritime Board, on August 12, 1961, by Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C. § 1111, note).

and in good faith seeking a declaratory order, where the record compels a finding, and the court has so found, that such an award would be inequitable?

3. In concluding that there was no basis for the Commission's principal findings, and that the Commission had abused its discretion, did the Court of Appeals apply an improper standard of review?

4. If the Court of Appeals erred in respect of questions 2 and 3, whether its judgment is nevertheless supportable on the grounds of (a) the *ex parte* participation in the Commission's decision on remand, of its attorneys who had previously acted in this case as adversaries against the carrier, and (b) the absence of legally cognizable damages.

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 *et seq.*; the Administrative Orders Review Act of 1950 (Hobbs Act), 64 Stat. 1129, 5 U.S.C. § 1031 *et seq.*; the Hepburn Act of 1906, 34 Stat. 584 *et seq.*; the Mann-Elkins or Commerce Court Act of 1910, 36 Stat. 539 *et seq.*; the Judiciary Act of 1911, 37 Stat. 1087 *et seq.*; the Urgent Deficiencies Act of 1913, 38 Stat. 208 *et seq.*; the Judicial Code, 28 U.S.C. 1 *et seq.*; and the Administrative Procedure Act, 60 Stat. 237 *et seq.*, 5 U.S.C. § 1001 *et seq.* Pertinent portions of Sections 22, 29, 30, and 31 of the Shipping Act; Sections 2, 3, 7, 8, 9(a) of the Hobbs Act; Section 5 of the Hepburn Act; Sections 1 and 3 of the Mann-Elkins Act; Sections 24, 207, 209, 211 and 213 of the Judiciary Act of 1911; the Urgent Deficiencies Act; Section 1336(a) of the Judicial Code; and Section 10 of the Administrative Procedure Act, are set forth in the Appendix.

STATEMENT OF THE CASE

This case involves a claim by Petitioner Consolo, a banana shipper, against Respondent Flota Mercante Grancolombiana, S.A. (hereinafter referred to as "Flota"), a steamship company, for reparations for alleged violations of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*).

1. *Flota's inability to obtain shippers.* Flota is a steamship company organized by the Governments of Colombia and Ecuador (R. 19). Flota's vessels have a limited amount of refrigerated ("reefer") space available to carry bananas from Ecuador (R. 77-80). For five years prior to July 1955 Flota was unable to obtain regular shippers to use the reefer hold in its vessels. It had had none since February 1954 (R. 77-82).

2. *The 1955 contract and option.* On July 20, 1955, Flota entered into a contract with Panama Ecuador, a new banana shipper, for the use of its reefer facilities for the carriage of bananas from Ecuador to Philadelphia (R. 177-88). The contract was entered into only after Flota advertised for interested shippers and received no response, and was the only way at that time that Flota could assure use of its reefer facilities (R. 19, 77-82, 134-39, 173). The contract was in accordance with prevailing and long standing industry practice. See *Philip R. Consolo* v. *Grace Line,* 4 F.M.B. 293, 297 (1953).[2]

The term of the contract was for two years, plus three years at Panama Ecuador's option, subject to its meet-

[2] In *Philip R. Consolo* v. *Grace Line Inc.,* 4 F.M.B. 293, 297 (1953), the Board found that such contracts had been utilized at least since the 1930's.

ing the rate offered by any other shipper (R. 183-84). The contract provided that if any provision was declared invalid Flota might terminate the contract on seven days notice without liability (R. 181).

3. *Exercise of the option.* In early 1957 Panama Ecuador advised Flota it wished to exercise its option. In March 1957 it met the terms of the option, thereby perfecting its contractual right to the remaining period of the 1955 contract. Flota's Board of Directors so determined on March 13, 1957, and advised Panama Ecuador thereof in late March 1957 (R. 188, 195-99, 430-38).

On May 22, 1957, Flota and Panama Ecuador formally amended the 1955 contract, acknowledging the previous exercise of the option, amending several earlier provisions, and providing that "all of the remaining terms and conditions [of the 1955 contract] shall remain in full force and effect as if this agreement had not been entered into" (R. 187-91, 442).

At the time Panama Ecuador applied to exercise its option, Consolo also applied for an exclusive contract for the same space, commencing July 20, 1957 (R. 204b-206). Consolo was formally notified on June 21, 1957, that his bid had not been accepted (R. 207).

*The Federal Maritime Board, affirmed by the Court of Appeals, found that none of Flota's actions during this period gave rise to any liability or violated any duty to Consolo** (R. 277-78, 663), and this finding is not now in issue.

4. *Consolo's request of August 23, 1957.* On August 20, 1957, the Board served an order on Grace Line, an-

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* Emphasis added throughout this Brief.

other carrier, in its Docket Nos. 771 and 775, to which Flota was not a party, directing that carrier to cancel its existing contracts with certain banana shippers, including Consolo, and thereafter to offer two year contracts to all qualified shippers upon an allocated space basis. The Board's order was premised on a novel theory, set forth in its April 30, 1957 Report, which theory was later held to be invalid, and upon a finding that Grace Line's existing contracts unlawfully preferred Consolo, *et al. Banana Distributors, Inc* v. *Grace Line Inc.,* 5 F.M.B. 278, 283, 286, I-II (1957), *vacated and remanded, Grace Line Inc.* v. *Federal Maritime Board,* 263 F. 2d 709 (C.A. 2d 1959).[3]

On August 23, 1957, his contract on Grace Line's vessels having been thus ordered cancelled, Consolo wrote a letter to Flota, citing the Board's ruling as to Grace Line, and stating that "I wish to be considered for a fair and reasonable amount . . ." of Flota's reefer space, and threatening suit against Flota if it failed to comply (R. 208). Consolo's letter did not specify the amount of space desired by him, or the date, voyage, or period for which space was desired, or the rates or terms desired by or acceptable to him; offered no undertaking, guarantee or other commitment; and tendered no bananas to Flota. This was the letter from which the Commission later dated reparations (R. 512).

5. *Flota's dilemma.* During the same period, and from then until mid-1959, Flota received numerous demands for reefer space from shippers and lawyers, requesting many times more than Flota's total reefer

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[3] Further proceedings: *Banana Distributors, Inc.* v. *Grace Line,* 5 F.M.B. 615 (1959), *affirmed,* 280 F.2d 790 (C.A. 2d 1960) (one judge dissenting), *cert. denied,* 364 U.S. 933 (1961).

capacity, and some like Consolo, threatening litigation for failure to comply (*e.g.*, R. 216-20, 386-90). Panama Ecuador, which had made a substantial investment in reliance on its contract with Flota, declared it would sue Flota for breach of contract if Flota complied with those demands (R. 38-39, 140, 152, 161). Flota faced litigation whichever way it turned, and the threat of a substantial suit for damages by Panama Ecuador.

6. *Flota's attempts to obtain a ruling from the Board.* On October 1, 1957, Flota's officials came to Washington to seek advice or a ruling from the staff of the Federal Maritime Board. The Board's staff, including the Chief of its Regulations Office, which was primarily concerned with such matters, stated they were unable to advise Flota whether or not its contract with Panama Ecuador was valid (R. 140-44, 158-59, 163-65, 167-68).

On October 30, 1957, Flota formally petitioned the Board for a declaratory order to terminate the uncertainty that had arisen in accordance with Section 5 (d), Administrative Procedure Act (5 U.S.C. § 1004), and Rule 5(i) and 10 of the Board's Rules (R. 37-41). As the court below found:

> "Flota clearly indicated at the first hearing that it would obey any order rendered by the Board. Flota upon the issuance of the Board's order complied with it. Thus, a prompt declaratory order would have served a primary purpose envisaged for it under the Administrative Procedure Act—to assist a party in governing its conduct without rendering itself liable to suit" (302 F. 2d at p. 896, n. 15) (R. 665).

Flota believed it would obtain a ruling within "a month or two months after we presented the problem" (R. 164-65).

7. *The Board's delay and ultimate action.* In January 1958 the Board promised "early action" (R. 56). The Board did not hold a meeting or assign a docket number to Flota's petition until May 1, 1958 (R. 63-64, 517-18). It caused further delay, over Flota's objections, by consolidating Flota's petition with a complaint meanwhile filed by Consolo, seeking $600,000 damages, from November 15, 1955 to November 15, 1957, and continuing damages thereafter (*ibid.;* R. 41-45); and then with a similar complaint filed in July 1958 by another claimant (R. 45-48).[4] The Board's Examiner contributed to further delay by repeatedly refusing to sever and postpone the reparations issues (R. 468, 551-53, 556-57),[5] and thereby necessitating the preparation of Flota's defense to more than $1,200,000 in reparations claims, in addition to the issue posed by its petition for declaratory order. As a result of the Board's initial six month delay, and the consolidation and then refusal to sever the reparations issues, *inter alia,* that decision was delayed for nearly two years, until June 22, 1959, served July 2, 1959 (R. 1-15).

In the meantime the Board's April 30, 1957 Report and August 20, 1957 order as to Grace Line, which had precipitated the controversy as to Flota, were under appeal and on February 13, 1959, were reversed by the Court of Appeals for the Second Circuit (*Grace Line* v. *Federal Maritime Board,* 263 F. 2d 709). In May 1959 the Board issued a further order against the

[4] Consolo's claim for the period prior to August 23, 1957 was later held to be without merit (R. 259, 278, 663); the second complaint was withdrawn in 1962 (F.M.B. Docket No. 841).

[5] A decision he later reversed in the middle of the hearings, too late to expedite the proceeding (R. 121-22).

Grace Line on a different theory.[6] By decision served July 2, 1959, in the instant case, the Board ordered Flota to cancel its contract with Panama Ecuador (R. 15-16), which it promptly did (R. 276-77).

8. *Case No. 15,330.* Flota petitioned for review of the Board's July 1959 action, under the Hobbs Act, to the extent it might serve as a basis for reparations (Case No. 15,330 below). No party has to this day challenged the jurisdiction of the Court of Appeals to entertain that action (*e.g.,* R. 34-35).

9. *The Board's reparations award.* In 1960 the Board held supplemental hearings to complete the evidence upon the reparations issue. By decision dated March 28, 1961 (R. 265-81), based upon the combined record of the earlier hearings and the supplemental hearings, it directed Flota to pay Consolo $143,370.98 reparations for the period August 23, 1957 to July 12, 1959 (R. 280-81), largely the period Flota's petition for declaratory order had awaited decision by the Board. The Board's Report stated, *inter alia,* that during this period Flota should have accepted its 1957 decision as to Grace Line (R. 276), without indicating awareness that that decision had meanwhile been reversed by the Court of Appeals for the Second Circuit (263 F. 2d 709).[7]

10. *The Petitions for Review in Nos. 16,366 and 16,369.* The Board's reparations order of March 1961 was then the subject of cross-petitions for review by the Court of Appeals, by Consolo in No. 16,366, and by

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[6] That order was ultimately sustained, by a split decision, 280 F.2d 790 (C.A. 2d 1960), *cert. denied,* 364 U.S. 933 (1961).

[7] The Board also indicated that Flota in 1957-59 should have relied on a 1953 report as to Grace Line (R. 276), as to which see R. 691.

Flota, in No. 16,369, both filed under the Hobbs Act (R. 491).

On July 7, 1961, Consolo filed his "Motion for Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond" (R. 620-37), in No. 16,369. After opposition by the United States and the Federal Maritime Board (R. 637-43) and by Flota and, after argument, the Court held the Motion in abeyance. In his briefs thereafter Consolo unequivocally urged the Court to take jurisdiction and dispose of the issues in both Nos. 16,366 and 16,369 (R. 647-50; see also R. 645-46).

11. *The Court of Appeals' first Decision.* By its decision of April 26, 1962 in Nos. 15,330,[8] 16,366 and 16,369, the Court found that it had jurisdiction in all respects (R. 660-63), and affirmed the Board's actions in Nos. 15,330, and 16,366 (R. 653-59, 663-64). However, in No. 16,369, upon Flota's petition, the Court of Appeals found that notwithstanding that the Board could properly conclude in the first hearing that the contract with Panama Ecuador was in violation of the Shipping Act, the Board was free to reexamine the circumstances of the violation in the supplemental hearings "to reach a fair conclusion as to whether any reparations should be assessed" (R. 667); and that there was "substantial evidence" supporting Flota's contention that it would be inequitable to force it to pay reparations (R. 665-67). The Court set aside the Board's reparations award and remanded the matter to the Commission (successor to the Board),

> "to consider whether, under all circumstances, it is inequitable to force Flota to pay reparations, or

[8] No. 15,330 had been held in abeyance (R. 652).

at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board" (302 F. 2d at p. 896) (R. 667).

In the proceeding before the Court of Appeals, the Commission's General Counsel, Mr. James L. Pimper, and Assistant General Counsel, Mr. Robert E. Mitchell, acted as advocates for the Commission, in opposition to Flota in No. 16,369, and in support of the Board's findings that Flota had violated the Shipping Act and should be compelled to pay reparations (R. 492, 651). Mr. Mitchell had also earlier acted as an advocate against Flota, as "Public Counsel" in the 1958-59 hearings, contending Flota had violated the Shipping Act (R. 480-84).

12. *The Commission's Report and Order on remand.* On remand the Federal Maritime Commission reopened the reparations questions, but denied Flota's request to take further evidence. Minutes of the Commission's meeting show that Mr. Pimper, General Counsel, was present at that meeting (R. 493-99, 524-25). After briefs and argument, the Commission on October 29, 1962, with Mr. Pimper, again present as General Counsel, and without notice to the parties, assigned to its General Counsel the function of preparing a "proposed report and order in accordance with instructions given at this meeting" (Minutes of October 29, 1962) (R. 526). No further Commission meetings were held upon this case for almost one year. On September 16, 1963, with Mr. Pimper (then Acting Managing Director) and Mr. Mitchell (then Acting General Counsel) present, the Commission approved their proposed report and order without change (Minutes of September 16, 1963) (R. 527).

The draft thus prepared and adopted as the Commission Report reiterated arguments earlier made to and rejected by the Court of Appeals, in which arguments Messrs. Pimper and Mitchell had joined as advocates. It did not mention the Court of Appeals' earlier finding of "substantial evidence" supporting Flota's contention that it would be inequitable to force it to pay reparations, and attempted to absolve the Board from any responsibility for the delay in acting on Flota's petition for declaratory order. It termed the invalid 1957 *Banana Distributors* decision an "authoritative pronouncement" even though reversed by the Court of Appeals for the Second Circuit. For the first time in six decisions in as many years of litigation, the Commission's Report sought to justify the Commission's and the former Board's reparations awards on the grounds that it was "unconvinced" of Flota's "good faith" in executing what it erroneously termed the "renewal" contract of May 22, 1957. With reductions for one admitted and one other error in the former Board's calculations, it found there was no equity whatever in Flota's contention and reinstated the former Board's vacated award, directing Flota to pay Consolo $106,001.00, with interest after 60 days (R. 500-14).

13. *The Petitions for Review in Nos. 18,230 and 18,235 and the Court's second decision.* After further cross-petitions to the Court of Appeals under the Hobbs Act, by Flota in No. 18,230 (R. 669-75) and by Consolo in No. 18,235 (R. 676), the Commission produced its official minutes disclosing that the Commission's report and order on remand were written, *ex parte,* by the same Commission attorneys who had opposed Flota as advocates before the Court of Appeals in the 1962 phase of the proceedings (R. 526-27).

By leave of Court (R. 685-86), Flota then supplemented its petition to so allege (R. 677-78). The cross-petitions in Nos. 18,230 and 18,235 were consolidated upon stipulation (R. 679, 684-85). In its opinion of December 17, 1964, the court below concluded that the Commission had ignored the guideposts of the court's earlier decision and the substantial weight of the evidence before it; that there was no basis for finding that Flota had not acted in good faith; and that the Commission had abused its discretion (R. 686-98). The court reversed the Commission's decision and remanded the matter to the Commission with directions to vacate the reparations order (R. 699).

In the proceedings in Nos. 18,230 and 18,235, neither Consolo, the Maritime Commission, nor the United States challenged any aspect of the Court of Appeals' jurisdiction under the Hobbs Act (R. 679-83). Likewise no party challenged the authority of the Maritime Commission to consider the circumstances of a violation of the Shipping Act to ascertain whether it would be unjust or inequitable to compel payment of reparations (R. 679-83).

The court below also found ". . . it unnecessary to rule upon [Flota's] objection to the active participation of the Commission's counsel who had earlier appeared before that court as an adversary, in the formulation and writing of the Commission's remand opinion" (R. 698), or Flota's contention related to the proper measure of damages (R. 671-75, 677, 679-80). It found in its 1962 opinion that the measure of damages employed was "relatively harsh" (R. 667). In its 1964 opinion it referred to Consolo's claimed damages as the loss of "speculative" and "unrealized" profits (R. 690, 698).

SUMMARY OF ARGUMENT

I

Jurisdiction below may be sustained on the general ground that carriers are entitled to initiate review of Shipping Act reparations orders under the Hobbs Act, and alternatively, on the narrow ground that since Consolo had invoked the court's jurisdiction of the same order in an effort to increase the amount thereof, the court was empowered to determine the entire controversy, on ancillary jurisdiction principles. In the lower court, both the Government and Consolo (the latter after an initial motion questioning jurisdiction) urged the court to take jurisdiction of the entire controversy. Only in this Court, after the lower court had ruled against their arguments on the merits, did either contest the lower court's jurisdiction.

Even now the Government contests only the broad ground, and concedes the narrower ground for the lower court's jurisdiction. As to the former, contrary to the Government's contention, because the instant case arises under the Hobbs Act and the Shipping Act, the issues and alleged policy considerations are substantially different from those in *ICC* v. *Atlantic Coast Line R. Co.,* No. 14, this Term.

A. The Hobbs Act in 1950 conferred jurisdiction upon the courts of appeals to review orders of the Maritime Commission "now subject to judicial review pursuant to the provisions of Section 31, Shipping Act, 1916." The Government and Consolo concede that reparations orders were "subject to judicial review" prior to 1950. Assuming, *arguendo,* their contention that review was exclusively by defense of ship-

per instituted enforcement suits, the question is whether such suits were subject to Section 31. Section 31 was a provision for venue and procedure, applicable by its terms *both* to suits to "enforce" and suits to "suspend or set aside". Even under the Government's and Consolo's contention therefore, review of a reparations order was "pursuant to . . . section 31"—and the Hobbs Act test is satisfied.

If Section 31 were held not to be applicable to enforcement suits brought under Section 30, the clear intention of Congress to make ICC venue and procedure provisions available also for similar suits under the Shipping Act, would be defeated; and the additional venue provisions of Section 31, intended for the shippers' benefit, would be unavailable. By the Government's logic, enforcement suits under Section 29 likewise would not be subject to the venue and procedure provisions of Section 31; since together Sections 29 and 30 cover all enforceable orders, the word "enforce" would be read out of Section 31. There is no evidence in the legislative history of the Shipping Act that Congress intended Section 31 not to apply to Section 30 enforcement suits, and there is affirmative evidence to the contrary.

The legislative history of the Hobbs Act shows that its overriding purpose was to provide a new, improved and uniform procedure for review of *all* judicially reviewable orders issued under the Shipping Act—as the Government contended below (R. 637-43). While the original bills were limited in coverage, the Maritime Commission proposed broader coverage "to secure uniform procedure with respect to *all reviewable orders*"; it explicitly named Section 22, Shipping Act, under which reparations orders are issued, and its

proposal was adopted. Congress had further reason to know that any bill to cover all reviewable orders would include reparations orders, because such orders were named in a list of reviewable ICC orders submitted by the Administrative Office of the United States Courts; and because during pendency of the legislation, this court decided in *United States* v. *ICC*, 337 U.S. 426 (1949), that orders concerning the payment of money were reviewable under the Urgent Deficiencies Act, forerunner of Section 31, Shipping Act.

In every relevant case involving review of Shipping Act reparations orders, the Hobbs Act has been held applicable—and in all such cases prior to this one, the Government has supported Hobbs Act review.

B. Even prior to the Hobbs Act, Shipping Act carriers had the right to institute review of reparations orders pursuant to Section 31, which provided for suits to "enforce, suspend, or set aside, in whole or in part, *any order* of the Board . . .". No limitation excluding reparations orders appears in the statute or in its legislative history.

C. Because Section 31 of the 1916 Act was modeled in part upon ICC practice, it is pertinent to examine that practice prior to 1916. The key to the availability of direct review of ICC reparations awards prior to 1916 is the Hepburn Act of June 29, 1906. Section 5 thereof imposed an express duty to comply with all ICC orders, including reparations orders. A later part of the same section provided for venue and jurisdiction in the circuit courts for suits "to enjoin, set aside, annul, or suspend *any order or requirement* of the Commission . . .". The language is unqualified and

there is no evidence that reparations orders were intended to be excluded therefrom. Five times in ten years, in the Hepburn Act, the Mann Elkins Act, the Judiciary Act, the Urgent Deficiencies Act and the Shipping Act, Congress dealt with suits to enjoin, suspend, annul or set aside "any order" of the ICC (or Shipping Board), and at no time manifested an intention to prohibit a carrier from initiating review of reparations orders. And in the only decisions interpreting this language it was held that ICC carriers had the right to initiate review of ICC reparations orders. *Southern Ry. Co.* v. *United States,* 193 Fed. 664 (Com. Ct. 1911); *Arkansas Fertilizer Co.* v. *United States,* 193 Fed. 667 (Com. Ct. 1911).

These decisions are entitled to compelling weight because of their proximity in time to the Acts in question, and because they were joined in by the Presiding Judge of the court, who had been Chairman of the Interstate Commerce Commission for 13 years immediately preceding his appointment to the Court, a member for 20 years and the principal ICC spokesman and a witness during the legislative consideration of both the Hepburn and Mann-Elkins Acts. In the absence of any clear indication to the contrary the conclusion is inescapable that Section 31 of the Shipping Act contemplated review of reparations orders as well as other reviewable orders under that Act.

The fact that venue and costs provisions in enforcement suits were somewhat broadened in 1906 will not support the Government's inference that enforcement suits were intended as the exclusive vehicle for review. Its argument that direct review was intended to apply only to obligatory and self-executing orders backed by provisions for per diem penalties is untenable, be-

cause, as enacted and for 23 years, the Shipping Act contained *no* "self-executing" or penalties provisions. The Government's arguments are but variations of those rejected in *Rochester Telephone Co.* v. *United States,* 307 U.S. 125, 136 (1939), *Baldwin* v. *Scott County Milling Co.,* 307 U.S. 378, 482-83 (1939); *United States* v. *ICC,* 337 U.S. 426 (1949); and *Pennsylvania RR Co.* v. *United States,* 363 U.S. 202 (1960), under which orders with respect to the payment of money, having the effect of both denial and grant, are reviewable under the "any order" language of the Urgent Deficiencies Act.

D. The policy considerations as to review of ICC orders are materially different from those affecting Maritime Commission orders reflected in the ICC's exclusion from the Hobbs Act, the differing problems relating to international shipping and the negligible number of Shipping Act reparations orders. The Hobbs Act overriding policy was to provide a new, improved and uniform system of review for all reviewable orders of the Commission. There is no evidence the Act was to cover only orders meeting all subsidiary objectives mentioned by the Government. The possibility that an occasional enforcement suit may be necessary after Hobbs Act review is as true of other orders as of reparations orders, and is merely a reflection of Congress' further policy to withhold enforcement powers from the Courts of Appeals.

Alleged Government inconvenience is inconsequential. Considerations of procedural convenience, economy in judicial time and shipper advantages support Hobbs Act review. The Hobbs Act merely transfers the administrative review phase of pre-Hobbs Act

enforcement suits, to the courts of appeals, whose decisions have res judicata effect, and leaves any remaining enforcement responsibilities to the district courts.

II

The Government concedes that the lower court had jurisdiction to entertain Flota's challenge to the Commission's reparations order in view of the fact that Consolo had already invoked Hobbs Act jurisdiction to review the same reparations order. The court's decision to take jurisdiction to settle the entire controversy is amply supported by principles of ancillary jurisdiction and considerations of procedural economy and fairness. It is further supported by section 9(a) of the Hobbs Act, which provides that when the court's jurisdiction is invoked and the agency record filed with it, it shall have exclusive jurisdiction to enter a judgment "determining the validity of . . . the order of the agency."

III

A. The lower court held that the mere fact the Board had found in 1959 that Flota's contract with Panama Ecuador was in violation of the Shipping Act did not preclude it from examining the circumstances of Flota's actions in the period prior to the Board's decision to assess the fairness of Consolo's reparations claim. Consolo did not challenge the validity of the holding in the proceedings below, and should not be permitted to raise the point here. The Government does not challenge the court's holding and recognizes that it does not differ in substance from the "firmly established mode of procedure" under the Interstate Commerce Act. The lower court's references to fair-

ness and equity are but a reflection of the statutory standard of violation—"unfair," "unjust," and "unreasonable" conduct. The Commission also has a discretionary reparations power under section 22 of the Shipping Act, which provides only that it shall issue such order "as it deems proper" and "may" award reparations.

B. The court below, which had the case before it twice, found no basis to support the Commission's key findings challenging Flota's good faith, and held that the Commission on remand had "ignored . . . the substantial weight of the evidence before it" (R. 689), and had "abused" its discretion (R. 698). There is in the court's action no departure from the normal standards of review.

Consolo states that he is "not expecting this Court to review the evidence." Though earlier recognizing that "the instant case . . . does not present the 'rare instance' calling for this Court's intervention to correct a gross misapplication of the standard governing review of agency findings", and also contending that the dispute is basically a private one between Consolo and Flota, the Government's brief does in effect ask the Court to review the evidence. The lower court's restraint in remanding to the Commission in 1962, and its careful opinions in twice considering the Government's arguments, establish that it made a "fair assessment" of the record. By its settled policy this Court should inquire no further.

C. The decision below is also supportable on the ground that the Commission attorneys who had previously acted as adversaries against Flota in this litigation, improperly participated and advised in the

Commission's decision on remand. The court below found it unnecessary to rule upon the issue (R. 698). It is supportable on the additional ground that the Commission failed to apply the proper measure of damages and that Consolo failed to prove compensable damages. In its April 1962 opinion, the court referred to the measure of damages employed by the Board and later by the Commission as "relatively harsh" (R. 667); in its December 17, 1964 decision, it referred to plaintiff's claimed damages as the loss of "speculative" and "unrealized" profits (R. 690, 698).

ARGUMENT

I. THE COURTS OF APPEALS HAVE JURISDICTION UNDER THE HOBBS ACT TO DETERMINE THE VALIDITY OF MARITIME COMMISSION REPARATIONS ORDERS

The jurisdiction of the Court of Appeals under the Hobbs Act may be sustained on either of two grounds: first, that as a general matter carriers respondent to Shipping Act reparations orders may initiate judicial review to determine the validity thereof by petition under the Hobbs Act; second, that even if such review is not available generally, the exercise of jurisdiction by the court below was nevertheless proper in the particular circumstances of this litigation.

In the Court of Appeals, the United States and the Federal Maritime Commission joined Flota in urging that court to exercise jurisdiction on both the above grounds (R. 637-43). Consolo's initial position was that the court should either dismiss Flota's petition on No. 16,369 (but not Consolo's), or require Flota to post a bond (R. 620-37). However, Consolo thereafter urged that, "since review was sought here, the issues should be openly, fairly, and finally litigated here—as

Congress intended" (R. 645-46), and that "all the facts are before the Court and the controversy is ripe for final disposition" (R. 647-50). Thus ultimately Consolo himself urged the court to take jurisdiction in all respects.

The Court of Appeals found that it had jurisdiction on both grounds (R. 660-63), and remanded the case to the Maritime Commission (R. 667). In the subsequent proceedings before the Court of Appeals, Nos. 18,230 and 18,235, upon petitions by both Flota and Consolo, *no party challenged any aspect of the court's jurisdiction* (R. 679-83).

Only in Consolo's petition to this Court, *after* he lost on the merits before the Court of Appeals in Nos. 18,230 and 18,235, did he assert that the Court of Appeals lacked jurisdiction to entertain Flota's petition in No. 18,230. And only thereafter, and after the grant of the writ on the ICC's petition in the pending *Atlantic Coast Line* case, involving review of ICC reparations awards, did the Government reverse its position as to whether Shipping Act carriers generally might initiate Hobbs Act review of a Maritime Commission reparations order.[9] The Government still concedes the narrower ground of the court's jurisdiction.

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[9] The Government here in effect incorporates its brief in the Atlantic Coast Line case.

A. Assuming That the Sole Mode of Review Prior to the Hobbs Act was Defense of an Enforcement Suit, the Hobbs Act Nevertheless Conferred Jurisdiction Upon the Courts of Appeals

1. Review of Enforcement Actions Was "Pursuant to . . . section 31"

Section 2 of the Hobbs Act,[10] which became law December 29, 1950, conferred upon the courts of appeals

> "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of . . . such final orders of the . . . Maritime Commission . . . as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended."

The ultimate question under this statute is whether on December 29, 1950, reparations orders were subject to judicial review "pursuant to the provisions of section 31, Shipping Act, 1916". The Government and Consolo concede that such orders were "subject to judicial review";[11] they dispute merely the form of review proceeding and the forum in which it might have been brought.

The controlling issue here, therefore, is not whether judicial review of reparations orders was available prior to 1950, nor indeed the form and venue of that

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[10] 5 U.S.C. § 1032.

[11] The Government's brief, p. 29, states for example, "We think it plain that the carrier is entitled to complete judicial review of the reparations order in the enforcement action". And see Consolo's brief, p. 13, "The statutes provide only one review of a reparation order: by a district court after suit by an injured shipper". See also Administrative Procedure Act, Section 10(b) (Appendix, *infra*, p. 82); and *United States* v. *ICC*, 198 F.2d 958, 963-64 (C.A. D.C. 1952); *cert. denied*, 344 U.S. 893.

review, but whether at that time review of such orders was "pursuant to the provisions of section 31, Shipping Act, 1916", as that phrase was intended in the Hobbs Act. The answer to this question must be in the affirmative.

Section 31, Shipping Act, 1916, stated:

> "That the venue and procedure, in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Section 31 did not, strictly speaking, create a right of review; it was rather a provision for venue and procedure, applicable by its terms both to suits to "enforce" and suits to "suspend or set aside". Since Section 31 prescribed venue and procedure for both types of suits, prior to 1950, it is not necessary in this case to decide whether the sole mode of review of reparations orders was, as Consolo and the Government now contend, by defense of enforcement suits, or whether a carrier might also have initiated review. Under either alternative, review of a reparations order was "pursuant to . . . section 31, Shipping Act, 1916"—and the Hobbs Act test is satisfied.

This conclusion is confirmed upon consideration of the statutory scheme of the Shipping Act.[12] Section 22 authorized the Board, after hearing, to "make such order as it deems proper", including orders for the

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[12] Pertinent provisions of the Shipping Act are set forth in the Appendix, *infra*, pp. 68-70.

payment of money. Sections 29-31 collectively provided for their enforcement and review. Section 29 dealt with *enforcement* of "any order of the board other than an order for the payment of money"; Section 30, with *enforcement* of an "order of the board for the payment of money"; and Section 31 prescribed venue and procedure for both actions to enforce and actions to suspend and set aside.

The net effect was that Sections 29 *and* 31 applied to enforcement of orders other than for the payment of money, and Sections 30 *and* 31 applied to enforcement of orders for the payment of money. Additionally, Section 31 provided venue and procedure for all suits to suspend and set aside.

Under this scheme Section 31 had a threefold function, with respect to reparations enforcement suits under Section 30. First, Section 31 applied to such suits the full range of venue and procedure provisions applicable to Interstate Commerce Act orders, as of 1916.[13] Second, to avoid any possible conflict between Section 30 and Interstate Commerce Act venue and procedure, it established the former as controlling in the event of conflict (by the "except as herein otherwise provided" clause); and third, it further broadened the venue of Section 30 enforcement proceedings by adding "but such suits may also be maintained in any district court having jurisdiction of the parties"[14]

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[13] See provisions of the Urgent Deficiencies Act and the Judiciary Act of 1911, Appendix, *infra*, pp. 78-81.

[14] Section 30 provided that suit might be brought in "any court of general jurisdiction of a State, Territory, District or possession of the United States". Section 31 added that such suits "may also be maintained in any district court having jurisdiction of the parties".

If Section 31 were held *not* to be applicable to enforcement suits under Section 30, then the venue and procedure provisions applicable to Interstate Commerce Act reparations enforcement suits would *not* be available for similar suits under Section 30, Shipping Act, and the broadened venue provisions of Section 31, permitting suits also to be "maintained in any district court having jurisdiction of the parties", would likewise be unavailable in suits under Section 30.

Moreover, if, as Flota's opponents contend, the provision in Section 30 for enforcement of orders for the payment of money were held to be the exclusive provision in the Shipping Act pertaining to the enforcement of such orders, and therefore to have the effect of rendering Section 31 inapplicable to proceedings for enforcement of reparations orders, by the same logic the provision in Section 29 for enforcement of all other orders would have a similar effect, and would render Section 31 inapplicable to the enforcement of such other orders. But, between them, Sections 29 and 30 embrace the universe of "enforceable" orders under the Shipping Act. Accordingly, by such an argument the word "enforce" would be read out of Section 31.

If the word "enforce" were read out of Section 31, the words "except as herein otherwise provided" likewise would become meaningless, because the only other venue and procedure provisions contained in the Shipping Act are those in the enforcement provisions of Sections 29 and 30. And the words "any order" in Section 31 would have to be read as "any order other than for the payment of money".

It is thus evident that the Government's and Consolo's contention would virtually destroy the language and structure of Section 31.

Neither the Government nor Consolo has pointed to any evidence in the legislative history of the Shipping Act that Congress intended the venue and procedure incorporated by Section 31 not to be applicable to Section 30 suits. The concluding provision of Section 31, that "suits brought to enforce, suspend, or set aside", etc., "may *also* be maintained in any district court having jurisdiction of the parties", is affirmative evidence to the contrary.

The very premise of the argument of the Government and Consolo, that Shipping Act reparations orders were intended to be reviewed only "as in similar suits in regard to orders of the Interstate Commerce Commission", assumes the applicability of Section 31 to review of reparations orders prior to 1950—for it is in Section 31 that the language just quoted appears.

It can only be concluded that even suits to enforce reparations orders under Section 30 were "pursuant to the provisions of Section 31" prior to the Hobbs Act. Even as to such suits, therefore, the Hobbs Act test is satisfied.

2. It Was the Purpose of the Hobbs Act to Provide a Uniform System for Review of All Reviewable Orders Under the Shipping Act

The overriding purpose of the Hobbs Act, clearly manifested in its legislative history, was to provide a new, improved and uniform procedure for review of *all* judicially reviewable orders issued under the Shipping Act. And as Consolo and the Government contended to the Court of Appeals there is evidence also "that Maritime Board reparations orders were specifically included within the coverage" of the Hobbs Act (R. 633, 641). Now that it has reversed its position, the Government does not assert that it earlier

misread the legislative history of the Hobbs Act; instead it just ignores it.[15]

Under the original legislative proposals, H.R. 1468 in the 80th Congress and H.R. 2916 in the 81st Congress, applicable to both the ICC and the Maritime Commission, orders entered under Section 22 of the Shipping Act, including reparations orders, and similar orders under the Interstate Commerce Act, would not have been covered.[16] Moreover, with respect to orders not covered, H.R. 2916 stated:

> "With respect to all other orders of the Interstate Commerce Commission and all other orders of the United States Maritime Commission, remedies now provided by law shall remain unaffected by this Act; and where an order is entered under one of the statutory provisions enumerated above and also under another [sic][17] statutory provision not enumerated above, such order shall not be reviewable under this Act, and the applicable remedies shall be those that would apply for this Act" (See Sec. 2, H.R. 2916, 81st Cong. 1st Sess. (1949).[18]

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[15] A true copy of the Government's argument to the Court of Appeals ("Reply Of Respondents To Intervenor's Motion To Dismiss Or Require A Bond"), has been filed with the Clerk of this Court. It appears also at R. 637-43.

[16] These bills are reprinted in Hearings before Subcommittees of the House Judiciary Committee, pp. 21-24, 106-109; Hearings on H.R. 1468, H.R. 1470 and H.R. 2271, 80th Cong. 1st Sess. (1947), and Hearings on H.R. 2915 and H.R. 2916, 81st Cong. 1st Sess. (1949), a single volume. Committee reports include House Report Nos. 1619, 1620 and 1621, 80th Cong. 2d Sess. (1948), and Senate Report No. 2618, 81st Cong. 2d Sess. (1950).

[17] Hearings, p. 107; see also p. 22.

[18] H.R. 1468 (80th Cong.) contained a similar clause, concluding "and the remedies now provided by law under the Urgent Deficiencies Act shall apply thereto" (Hearings, p. 22).

Thereafter, the Maritime Commission's Chairman and Solicitor urged the House Judiciary Committee to *broaden* the coverage of the proposed legislation so far as that Commission was concerned, to extend to "all reviewable orders" of the Commission. The Commission's Chairman advocated "substitution of the new procedure for the old with respect to all reviewable orders" of the Commission, "in order to secure uniform procedure with respect to *all reviewable orders*" (Hearings, pp. 144, 145, 147). The Commission's Solicitor testified:

> "We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders.
>
> "The act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, Section 22 of the Shipping Act, 1916, and we feel that this is shown in our written report, and I will not elaborate upon it, that the provisions of this act should apply to all reviewable orders of the Maritime Commission" (Hearings, p. 137).

He also proposed amendatory language to H.R. 2916 (Hearings as above, p. 147), which he testified would eliminate fears "that the bill might have precluded review of some cases . . ." (Hearings, p. 149). The bill was amended and enacted as the Commission proposed. The language thus proposed and adopted brought within the Hobbs Act all orders of the Commission "subject to judicial review, pursuant to the provisions of Section 31 of the Shipping Act". It is completely clear that this amendment was intended to describe all reviewable orders, without exception, and specifically

including orders under Section 22, under which reparations orders are issued.

Congress had further reason to know that reparations orders were included within the ambit of reviewable orders covered by the Hobbs Act. The comparability of many orders issued by the Maritime Commission and the ICC was the premise for originally including both these agencies in the same bill. Prior to the exclusion of the ICC from the bill,[19] and the broadening of the coverage of the proposed legislation to include all reviewable orders of the Maritime Commission, the Administrative Office of the United States Courts submitted, and the House Judiciary Committee reprinted in its Report No. 1621, pp. 3-7, a list of 40 different kinds of actions of the ICC "now included in the jurisdiction of the district courts, under the interstate commerce laws", including "13. Actions by complainants or persons with beneficial interest to enforce compliance with ICC orders for the payment of money. . . ."[20]

This list immediately followed a statement that "if H.R. 1468 is enacted, the jurisdictional proceedings covered by that bill will be transferred to the circuit courts of appeals" (House Report No. 1621, 80th Cong.

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[19] The Assistant Chief Counsel of the Interstate Commerce Commission testified that problems of review under the Interstate Commerce Act were unique. He stated that "The orders of the Interstate Commerce Commission, I think it will be conceded, are unlike those of any other administrative agency" and that the ICC should be excluded from coverage of the proposed legislation. This request was granted. Hearings, p. 160; see generally pp. 32-49, 152-172.

[20] Also "16. Actions to enforce, suspend, or set aside decisions, orders, or requirements . . ." of the Commission.

2d Sess., p. 4). The fact that H.R. 1468 was thereafter amended to cover all reviewable orders of the Maritime Commission is additional persuasive evidence that Congress intended the Hobbs Act to include reparations orders and any other Maritime Commission orders comparable to those in the list submitted by the Administrative Office of the United States Courts.

During the pendency of this legislation in Congress, some 18 months before the Hobbs Act was finally passed, this Court decided *United States* v. *ICC*, 337 U.S. 426 (June 20, 1949). It there held that an ICC order concerning the payment of money damages (there denial of reparations) was reviewable under the Urgent Deficiencies Act (38 Stat. 208)—albeit by a one-judge rather than a three-judge court. It cannot be presumed that Congress, the Judiciary Committees and the interested Government agencies and witnesses were not fully aware of the decision,[21] or that they had no opportunity thereafter to object to the inclusion in the Hobbs Act of orders relating to the payment of money, if that had been their disposition.[22]

To the contrary the Senate Judiciary Committee, Report No. 2618, December 11, 1950 (pp. 3, 5) commented that "in many cases" three-judge courts were required—which implicitly recognized that the three-judge court requirement did *not* apply to all reviewable orders.[23] Yet the clear intention throughout con-

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[21] The pendency of that litigation was referred to in House Report No. 1621 (1948), p. 25.

[22] Cf. United States v. National City Lines, 337 U.S. 78, 82-83 (1949).

[23] The district court in *D.P. Piazza Co.* v. *West Coast Line*, 113 F. Supp. 193, 196 (S.D.N.Y. 1953), aff'd, 210 F. 2d 947 (C.A. 2d 1954), cert. denied, 348 U.S. 839, drew the same inference.

sideration of the Hobbs Act was to provide a new procedure for all reviewable orders.

The legislative history of the Hobbs Act thus provides powerful additional support for the Court of Appeals' conclusion that it had jurisdiction under that Act to review Shipping Act reparations orders.

3. The Judicial Precedents Under the Hobbs Act Unanimously Support Review

In every case decided since the Hobbs Act involving review of Federal Maritime Board or Commission orders in reparations proceedings, the Hobbs Act has been held applicable—and in all such cases the United States, Federal Maritime Board and/or Commission have supported Hobbs Act review. *D. L. Piazza* v. *West Coast Line,* 113 F. Supp. 193 (S.D.N.Y. 1953), and *D. L. Piazza Co.* v. *West Coast Line,* 119 F. Supp. 937 (N.D. Ill. 1953), were actions brought in the district courts subsequent to the Hobbs Act to review denial of reparations. The district court in each case dismissed, upon motion of the Maritime Board and the United States asserting Hobbs Act jurisdiction. The Court of Appeals affirmed in the first case, and this Court denied review. *D. L. Piazza Co.* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2d 1954), *cert. denied,* 348 U.S. 839.

Hobbs Act jurisdiction was exercised without challenge by any party in *Kempner* v. *FMC,* 313 F. 2d 586 (C.A.D.C. 1963), *cert. denied,* 375 U.S. 813 (denial of reparations by the Commission); *Swift & Company* v. *FMC,* 306 F. 2d 277 (C.A.D.C. 1962); and *States Marine Lines* v. *FMC,* 313 F. 2d 906 (C.A.D.C. 1963), *cert. denied,* 374 U.S. 831, the latter two involving petitions for review of reparations, precisely as in the instant case.

B. Carriers Had the Right to Initiate Review of Shipping Act Reparations Orders Even Prior to the Hobbs Act

The assumption heretofore made, that prior to the Hobbs Act, review was available only by defense of an enforcement suit under Section 30, Shipping Act, is in any event invalid. Even prior to the Hobbs Act a Shipping Act carrier had the right to institute review of reparations orders pursuant to Section 31 of the Shipping Act. The language of Section 31 is unqualified. It contemplated suits to "enforce, suspend, or set aside, in whole or in part, any order of the board . . .". No limitation excluding reparations orders appears in Section 31 itself, elsewhere in the Shipping Act, or in its legislative history.

The Government and Consolo contend that Section 30 provides the exclusive means for review of orders for the payment of money, through defense of an enforcement suit. But if this contention were upheld, by the same logic Section 29 would provide the exclusive means for review of all other orders, also through defense of an enforcement suit, and Section 31 would be read out of the statute.

C. Experience Under The Interstate Commerce Act Prior to 1916 Confirms the Right To Direct Review

There is evidence also that, with modifications "because of the difference between rail and water traffic" (53 Cong. Rec. 8106), the sponsors of the Shipping Act legislation intended in 1916 to adapt "the nearly 30 years of experience of the Interstate Commerce Commission . . ." in the enforcement of the Interstate Commerce Act (59 Cong. Rec. 8081). In view of this statement and of the well-known rule that "statutes are construed by the courts with reference to the circumstances

existing at the time of the passage,'"[24] the law under the Interstate Commerce Act prior to 1916 assumes particular importance.

The key to the availability of direct review of ICC reparations awards prior to 1916 is the Hepburn Act of June 29, 1906 (34 Stat. 584). Prior to 1906, the Interstate Commerce Act imposed no direct obligation upon carriers to obey ICC orders, without judicial enforcement proceedings, and no carrier (or shipper)[25] ever sought review by a suit to enjoin, suspend or set aside an ICC order.[26]

Section 5 of the Hepburn Act (Appendix, *infra*, p. 73), amending Section 16 of the Interstate Commerce Act, for the first time imposed an express duty to comply with ICC orders. It provided:

> "It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect" (34 Stat. 584, 591).

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[24] United States v. Wise, 370 U.S. 405, 411 (1962); United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 480-81 (1932).

[25] See United States v. Los Angeles & S.R. Co., 273 U.S. 299, 309 (1927); and 22 ICC Ann. Rep. 20 (1908).

[26] The Government's brief (p. 12) in the pending Atlantic Coast Line case incorrectly describes the 1905 Circuit Court of Appeals decision in Western N.Y. & P.R. Co. v. Penn Refining Co., 137 Fed. 343, 354 (C.C.A. 3d 1905), aff'd, 208 U.S. 208 (1908), as expressly holding that no reparations award was reviewable. That case involved a shipper's suit to enforce an ICC reparations award, and the "express" holding referred to by the Government, was dictum. It was coupled with and reciprocally related to the further dictum that a shipper likewise could not obtain review of an ICC action *denying* reparations—which of course does not reflect the law today. United States v. ICC, 337 U.S. 426 (1949).

Reparations orders were among those contemplated, because earlier portions of Section 5 dealt with orders for the payment of money, among other things, and later portions with orders other than for the payment of money.

Consistently with the obligation thus imposed, the penultimate subsection of Section 5 further stated:

> "The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend *any order or requirement of the Commission* shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated . . . and jurisdiction to hear and determine such suits is hereby vested in such courts . . ." (34 Stat. 584, 592) (Appendix, *infra,* p. 75).

By this provision, the Hepburn Act conferred jurisdiction upon the circuit courts to enjoin, set aside, annul and suspend "any order or requirement" of the Interstate Commerce Commission. The language is unqualified, and reparations orders must have been among those contemplated, for Section 5 was concerned with them.

The Hepburn Act was followed by the Mann-Elkins Act of 1910 establishing the Commerce Court, the Judiciary Act of 1911, the Urgent Deficiencies Act of 1913, and the Shipping Act, 1916. Five times within ten years Congress dealt with jurisdiction, venue and procedure, with respect to suits to enjoin, suspend, annul, or set aside "any order" under the Interstate Commerce Act and the Shipping Act. Each afforded an occasion for Congress to manifest an intention to pro-

hibit a carrier from initiating review of a reparations order, if that had been Congress' intention. Instead the provisions respecting reviewability in these laws uniformly manifest an unqualified intention to permit and provide for review of "any order", without excluding orders for the payment of money (Appendix, *infra,* pp. 70, 75-78).

Moreover, in the only decisions interpreting the Hepburn and successor acts prior to 1916, it had been held that ICC carriers had the right to initiate review of ICC reparations orders under the "any order" language above quoted. The first action by a carrier to review an ICC reparations order came before the Commerce Court in 1911, upon a motion to dismiss for lack of jurisdiction[27] *Southern Ry. Co.* v. *United States,* 193 Fed. 664 (Com. Ct. 1911). The Commerce Court rejected the same arguments as the Government now makes, and upon consideration of both the Hepburn and Mann-Elkins Acts, *expressly held that its jurisdiction extended to carrier-instituted suits to annul ICC reparations orders.*[28]

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[27] The first action to enjoin any order of the Interstate Commerce Commission reached the Supreme Court in 1909 in Stickney v. I.C.C., 215 U.S. 98 (1909) (involving a rate order).

[28] The Commerce Court extended this ruling in Arkansas Fertilizer Co. v. United States, 193 Fed. 667 (Com. Ct. 1911), to review an action by a shipper to set aside an ICC order denying a carrier's application for authority to make a refund to the shipper. In two subsequent cases the Commerce Court asserted jurisdiction to review actions to set aside ICC orders denying reparations: Russe & Burgess v. ICC, 193 Fed. 678 (Com. Ct. 1912) and Thompson Lumber Co. v. ICC, 193 Fed. 682 (Com. Ct. 1912), thereafter dismissed for want of jurisdiction upon authority of the intervening Supreme Court decision in Procter & Gamble v. United States, 225 U.S. 282 (1912), which was in turn overruled in Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939).

The Government now denies the force of the *Southern Ry. Co.* decision on the grounds that it "did not consider the Act's legislative history" (its brief in *Atlantic Coast Line*, p. 15). But the opinion in *Southern Ry. Co.* was joined in by Presiding Judge Knapp, who prior to his appointment to the Commerce Court in 1910 had been Chairman of the Interstate Commerce Commission since 1898, and a member since 1891. As Chairman he was the principal ICC spokesman and a witness during the legislative consideration of both the Hepburn Act of 1906 and the Mann-Elkins Act of 1910, by which the Commerce Court was created.[29] Among all persons with knowledge of the problems, practice and procedure under the Interstate Commerce Act, and the legislative history and intent of the Hepburn and Mann-Elkins Acts, he must be regarded as foremost. The *Southern Ry.* decision cannot be impeached for lack of knowledge of legislative history; indeed, for Judge Knapp's unique experience, it is entitled to compelling weight.

Less than two years later Congress passed the Urgent Deficiencies Act of 1913 (38 Stat. 208), transferring to district courts the jurisdiction previously vested in the Commerce Court. That Act repeated the "any order" language interpreted in the *Southern Ry.* case, in its provision for "venue of any suit hereafter brought to enforce, suspend, set aside, in whole or in part, any order of the Interstate Commerce Commission" (38

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[29] Upon the dissolution of the Commerce Court, Judge Knapp was assigned to the Circuit Court of Appeals for the Fourth Circuit. (C.A. Miller, The Lives of the Interstate Commerce Commissioners and the Commission Secretaries, pp. 31, 32 (1946)). See also Note on the Constitution of the Court, 188 Fed. 229).

Stat. 220). The reenactment of the language in question, without change, cannot be disregarded.[30]

We come thus to 1916, when the Shipping Act was passed. The conclusion is inescapable that in referring to "suits brought to enforce, suspend, or set aside, in whole or in part, any order", Section 31 of the Shipping Act likewise contemplated actions to suspend or set aside reparations orders.

The Government suggests that because provision was made elsewhere in the Hepburn Act to facilitate enforcement of ICC reparations orders, by somewhat broadening venue and by exemption of shippers from costs in enforcement suits, Congress could not have intended at the same time to permit a carrier to initiate review to set aside an invalid reparations order. Enlargement of rights as to venue and costs in an enforcement suit is not proof of an intention of Congress in 1906 to make reparations enforcement suits the exclusive vehicle for review. It is a more logical inference that Congress intended the direct review provision of the Hepburn Act to be a general review provision, applicable to all orders, with the provision for enforcement suits at law for reparations orders preserved because of the carrier's Constitutional right to demand a jury trial.[31] The broadened venue and cost provisions in such enforcement suits are completely consistent with this hypothesis.

If the result for which the Government argues has been intended, surely some clear reflection of that in-

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[30] The Government's brief in Atlantic Coast Line, pp. 15, 41, states also that the plaintiff in Southern Ry. later dismissed its action and that it could not be appealed. The dismissal was by stipulation "without prejudice", and the earlier opinion sustaining jurisdiction was neither withdrawn nor subsequently overruled.

[31] Meeker & Co. v. Lehigh Valley R.R. Co., 236 U.S. 412 (1915).

tention would have appeared in hearings, reports, or debates. Surely Congress could have found the words to express that intention in the statute. In the same Section 5 of the Hepburn Act in which the review provisions appear, Congress referred variously to "orders for the payment of money", "every order of the Commission", "any order made under the provisions of section 15 of this Act", and "any order of the Commission".[32] Precision in the choice of language is manifest. Yet in the jurisdiction and venue provisions it referred without limitation to "any order of the Commission". In the face of the unqualified language of the venue and jurisdiction provisions, the adjustments in the enforcement mechanism in 1906 will not support the Government's inference.

The Government in *Atlantic Coast Line* has also contended that by the Hepburn Act, orders other than for the payment of money were for the first time made obligatory and "self-executing" by the provision for per diem penalties for violations, and that jurisdiction to entertain actions to enjoin, suspend, or set aside was conferred only as a measure of relief against the obligation.[33] It concludes that orders as to which

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[32] (34 Stat. 584, 590, 591).

[33] In this connection the Government's brief in Atlantic Coast Line, pp. 19-20, quotes portions of statements by Senator Foraker at 40 Cong. Rec. 5133, and Senator Long at 40 Cong. Rec. 4368. Senator Foraker unsuccessfully advocated an amendment under which the Government would prosecute suits for rate reductions without prior proceedings before the ICC and the courts. The remark quoted by the Government is a portion of a heated exchange by Senator Foraker with a proponent of the legislation, during which the latter suggested that Senator Foraker did not understand the existing law. In view of Senator Foraker's contradictory statements as to the meaning of the bill, the suggestion seems proper. At 40 Cong. Rec. 5132 he commented: "The bill

Congress provided no monetary penalties, such as ICC reparations orders, should be left to review exclusively in enforcement proceedings.

But if the measure of reviewable orders was as the Government says, then no order under the Shipping Act, 1916, would have been reviewable — because Congress did not impose penalties for the violation of orders under the Shipping Act until 1939.[34] By the Government's logic Section 31 would have been a virtual nullity for 23 years.

The Government's argument that only "self-executing" orders were intended to be directly reviewable is but a restatement of the argument made and rejected in earlier years, that only orders enforced by the Commission were directly reviewable. Both arguments describe orders "other than for the payment of money". Such an argument was rejected in this Court in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 136 (1939),[35] not cited in the Government's brief.

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does not provide for a suit being brought by the carrier"—which obviously was incorrect. If his comments in context are a reliable reflection of the intention of Congress as to the bill subsequently enacted, which we deny, still he said nothing to indicate that enforcement suits were intended to be the exclusive means for reviewing reparations orders. The same may be said for Senator Long's comments.

[34] P.L. 259, 76th Cong. (1939), 53 Stat. 1187, amending Section 806, Merchant Marine Act, 1936 (46 U.S.C. § 1228).

[35] The Court stated:

> "To be sure the opinion in the Procter & G. Co. Case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court, however, have dispensed with this requisite for review" 307 U.S. at 136.

Further, the source of the carrier's obligation to obey ICC orders was not in the monetary penalties clause of the Hepburn Act, but in the sixth subsection of Section 5 of the Hepburn Act (34 Stat. 591), which was *not* limited to orders other than for the payment of money. As noted above that subsection imposed an affirmative duty upon every common carrier to observe and comply with *all* ICC orders "so long as the same shall remain in effect".

It thus cannot be maintained that a reparations order imposed no obligation, or had no legal consequences. Even if no monetary penalties attached for refusal to pay, reparations orders normally carried an interest obligation.[36] The Court held in *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 482-83 (1939), that payment pursuant to a reparations order was not "voluntary" (and the carrier's recovery thereof was not barred when the ICC later withdrew its reparations order), stating that a reparations order imposed an immediate liability which "persisted until payment", and that the carrier "may not reasonably be held . . . bound to await suit or delay adjudication . . . while expenses of litigation, interest, and fees for its adversary's counsel accumulated".[37]

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[36] Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co., 269 U.S. 217, 239 (1925); Hope Cotton Oil Co. v. Texas & Pacific Ry. Co., 10 ICC 696, 704 (1905).

[37] The Court's comment in Meeker & Co. v. Lehigh Valley R. Co., 236 U.S. 412 (1915) that the reparation order provided an evidentiary presumption was in reply to an attack upon the constitutionality of the provision according prima facie weight to ICC reparations orders. It is not authority for the proposition that a carrier had no right to direct review.

If, as there held, a carrier can pay a reparations award and thereafter maintain a petition for reconsideration of the award with the agency, it logically should also be permitted to seek judicial review if the agency refuses to reconsider. Yet if defense of an enforcement suit is the exclusive means for review, a carrier which has succumbed to the coercive effect of Section 16 of the Interstate Commerce Act, or Section 30 of the Shipping Act, would have no means to obtain review. The very policy of the Act to encourage payment would be defeated, and review would be denied the carrier. The statute cannot have been intended to have this result.

Any remaining doubt must be resolved by later decisions that the term "any order" as used in the Hepburn Act, carried forward into the Urgent Deficiencies Act of 1913 and then codified, includes orders with respect to the payment of money. *United States* v. *ICC,* 337 U.S. 426 (1949); *Pennsylvania R.R. Co.* v. *United States,* 363 U.S. 202 (1960); *cf. St. Louis & O'Fallon R. Co.* v. *United States,* 279 U.S. 461, 482 (1929). *United States* v. ICC held that a shipper might secure review of an ICC order denying reparations, and that such review was under the Urgent Deficiencies Act (38 Stat. 208), although not under three-judge court procedure. In *Pennsylvania R.R.,* the Court found that an ICC order finding certain rail rates "unjust and unreasonable" had "legal consequences" (citing *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 131, 132, 143 (1939)); was "essentially one 'for the payment of money' "—and that the railroads "had a right to have the Commission's order reviewed"

under 28 U.S.C. § 2321, in a one-judge district court (363 U.S. 202).[38]

D. The "Policy" Considerations Urged by the Government Are Neither Persuasive Nor Applicable to Hobbs Act Review of Maritime Commission Reparations Orders

Recognizing that the statutory language does not support it, the Government admits (brief, p. 24) that its "major focus is on considerations of policy". There are no policy considerations applicable to Shipping Act reparations orders of sufficient importance in any event to warrant disregard of the unqualified language of the Hobbs Act and Section 31 of the Shipping Act.

This aside, the Government again makes the error of asserting that the policy considerations in this case are no different from those in *Atlantic Coast Line*. We join in the pertinent response made there by the railroad respondents and submit further that the very fact that ICC orders were excluded from Hobbs Act review, and at the ICC's request, proves that neither

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[38] We see no point in trying to untangle the web of Pittsburgh & W. V. Ry. Co. v. United States, 6 F. 2d 646 (W.D. Pa. 1924); Brady v. I.C.C., 43 F. 2d 847 (N.D. W. Va. 1930), aff'd, 283 U.S. 804; and Baltimore & O. R. Co. v. United States, 87 F. 2d 605 (C.C.A. 3rd 1937), cited by the Government. They were all decided after passage of the Shipping Act; and make no mention of Southern Ry. Co. v. United States, 193 Fed. 664 (Com. Ct. 1911) and Arkansas Fertilizer Co. v. United States, 193 Fed. 667 (Com. Ct. 1911). They seem inextricably related to the negative order doctrine enthroned in Procter & Gamble Co. v. United States, 225 U.S. 282 (1912), which along with the Brady case, was overruled in Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939). With the perspective of the last cited case and Pennsylvania R.R., it would appear that the Government's present position may itself be but a vestigial remnant of the discredited Procter & Gamble philosophy.

it nor the Congress regarded the same considerations applicable to both agencies.[39]

The great volume of business under the Interstate Commerce Act—an important consideration prompting the ICC to request exclusion from the Hobbs Act—is itself a material difference. By contrast, by Consolo's count, there were no more than five reparations awards under the Shipping Act in the first forty-five years of its history (1916-1961) (R. 622).

The Government's "policy" arguments fall into two categories, as they must. First, it alleges policy grounds for holding that the Hobbs Act did not carry out the clearly expressed intent of its sponsors—to provide a new, improved, and uniform system of review for all reviewable orders of the Maritime Commission. Second, it alleges grounds for carving out of section 31 of the Shipping Act, which provides for review of "any order", an unexpressed exception for reparations orders. In both aspects the policy considerations relied upon are spurious.

As to the Hobbs Act, the Government's brief (p. 16) refers to three Congressional objectives: to eliminate the necessity for two trial-type proceedings, to eliminate three-judge district courts, and to eliminate direct appeals to this Court. The Government would confine the Hobbs Act to cases where these objectives are accomplished. The first objective is irrelevant on the question whether reparations orders are covered; what Congress had in mind was the practice in certain suits for the review of rate orders (usually where the carrier alleged confiscation) of introducing evidence in the review proceeding. The Hobbs Act itself provides

[39] Hobbs Act Hearings, *supra*, p. 160.

(section 7(c)) for a reference to a district court to take additional evidence in appropriate cases, thus giving rise to two trial-type hearings. Also, conceding that court of appeals review may not eliminate the need for an enforcement suit, nevertheless that is equally true of review of orders other than those for the payment of money.[40]

As a practical matter, where a carrier has received an adverse court of appeals ruling in the Hobbs Act proceeding, its motivation for prompt payment is substantially increased. The coercive effect of the provisions in section 30 giving the award prima facie weight, reinforced by the court of appeals decision as to the validity of that order, plus provision for attorneys' fees and interest, will certainly provide a powerful incentive for payment. It is therefore a reasonable assumption that in a substantial number of cases there will be no necessity for a further enforcement suit by the shipper. In that event the shipper is clearly advantaged.

As to the remaining objectives stated by the Government, it concedes that the Hobbs Act embraces a broader class of cases than those formerly brought in three-judge courts and subject to direct appeal. For example, shipper suits to set aside orders denying reparation, which formerly were cognizable in one-judge

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[40] Such a possibility exists whenever a suit is brought to enjoin or set aside judicially enforceable agency action. E.g., Pennsylvania R.R. Co. v. United States, 363 U.S. 202 (1960); Frozen Food Express v. United States, 351 U.S. 40 (1956); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Parker v. Brown, 317 U.S. 341 (1943); Columbia Broadcasting Co. v. United States, 316 U.S. 407 (1942); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Shields v. Utah Idaho Central R.R., 305 U.S. 177 (1938); Packard v. Banton, 264 U.S. 140 (1924); Ex Parte Young, 209 U.S. 123 (1908).

courts, are subsumed under the Act. *United States* v. *ICC,* 337 U.S. 426 (1949), so held (in substance) with respect to ICC orders; and *D. L. Piazza Co.* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2d 1954), *cert. denied,* 348 U.S. 839, and *D. L. Piazza Co.* v. *West Coast Line,* 119 F. Supp. 937 (N.D. Ill. 1953) so held with respect to Shipping Act orders. As the right of direct appeal was co-extensive with the three-judge court procedure, it is similarly plain that the Hobbs Act embraces cases in addition to those where direct appeal was formerly available.

The policy arguments for reading an exception into section 31 are equally untenable. The Government alleges that because reparations orders are of lesser public importance than orders having future effect, the agency should not be called upon to defend the former in suits to set them aside. It also urges that such suits would deprive the shipper of the procedural advantages prescribed for him in enforcement suits.

Government agency participation is inconsequential. As stated above, the volume of Shipping Act reparations orders is negligible. In addition, reparations orders must, of course, be based upon an agency finding of violation of the Shipping Act, normally made in conjunction with an order having declaratory or future effect and thus unquestionably subject to Hobbs Act review. Moreover, the Government concedes that the reparations order itself is subject to Hobbs Act review at the shipper's instance. Thus the underlying controversy, the parties, the issues, the record[41] and the identical order may already be before the court of

[41] The reparations order may be based upon the identical agency record or where, as here, there has been a deferral of the reparations issue, the original record, plus a supplemental record.

appeals in a Hobbs Act proceeding, in which the agency is a party. Even where there is no such review in collateral aspects, the agency may be called upon to intervene in an enforcement proceeding, where the validity of its order is called in question in a suit between private parties. The present case, for example, entails questions on the merits, as to the agency's powers, of sufficient importance to have warranted this Court's including them in the writ of certiorari; it is inconceivable that the agency would always be willing to have such issues tried in an enforcement action without its participation.

In addition, there are countervailing policies overriding any inconvenience to the agency in defending reparations orders. One is procedural convenience. If review of the award of reparations were confined to the defense of an enforcement suit, the carrier would have an appeal as of right to a court of appeals, subject thereafter to a writ of certiorari by this Court. Direct review of the agency order under the Hobbs Act eliminates one full step, where the carrier's petition is successful; and where the Hobbs Act appeal is rejected, it may eliminate the need for any further enforcement proceeding. Even if a further enforcement proceeding is necessary, the scope of both that proceeding and any subsequent appeal (as of right) to a court of appeals will be reduced to the extent of the issues tried in the Hobbs Act proceeding. The court below clearly held that issues decided in a Hobbs Act proceeding as to the validity of the agency order—"questions of law . . . matters of jurisdiction and fairness of administrative procedure" (R. 662), will have a res judicata effect in any subsequent enforcement proceeding. Thus the suggestion that there is a "double" review is false.

Conversely, if the Court should hold that enforcement suits provide the exclusive mechanism for review and that "complete review" may be obtained by the carrier in such a proceeding,[42] the carrier must be entitled in the enforcement proceeding to attack the validity of the agency order, its rulings on questions of law, agency jurisdictional questions and questions of fair procedure. This would ordinarily be by motion to the district court in the absence of the jury. To the extent that issues in an enforcement suit may be subject to further proceedings, *e.g.*, upon the question of damages in an unjust discrimination case, such proceedings still remain, even after the court has upheld the validity of the agency order. The net result is that even in an enforcement suit, assuming no Hobbs Act review, there are two distinct steps. The sole effect of the Hobbs Act under the ruling below is to transfer the first of these steps—the phase which is truly the review phase—to the court of appeals. Congress selected the court of appeals as the court best suited to review functions and the district courts as those best suited to trial functions and enforcement responsibilities, if either or both should be necessary.

Nor is there merit to the Government's argument that this procedure deprives the shipper of the procedural advantages provided by the Shipping Act. The shipper—in whose behalf the Government's argument is ostensibly made—is in fact advantaged by Hobbs Act review. Although he has a right to intervene (with no exposure to liability for costs), he is not bound to do so. If he chooses he may rely upon the Government to defend its order.

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[42] For the reasons stated in the respondent's brief in Atlantic Coast Line, pp. 15-18, Flota does not believe that review by defense of an enforcement suit is either "complete" or satisfactory.

Thus, although the shipper may have no choice of forum and no right to attorney's fees in a Hobbs Act review proceeding initiated by the carrier, he is compensated by the saving of a step in the litigation and by having the Government represent his interests. If an enforcement proceeding becomes necessary, he still has the advantages accorded by section 30. For that matter, nothing in the Hobbs Act or elsewhere prevents the shipper from instituting his enforcement suit while the Hobbs Act proceeding is pending, or before it is instituted. The pendency of two proceedings may afford the reviewing courts flexibility to decide, case-by-case, which, if either, of the two should be stayed pending the outcome of the other.[43]

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[43] The possibility of a party's proceeding with cases raising the same issue simultaneously in courts of different states (e.g., Hanson v. Denckla, 357 U.S. 235 (1958)), in courts of equity and courts of law, or in state and federal courts (e.g., Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959)) is so common as to be unworthy of remark and has never of itself been regarded as a basis for refusing jurisdiction. Cf. McClellan v. Carland, 217 U.S. 268 (1910). In United States v. New York, N. H. & H. Ry. Co., 276 F. 2d 525, 537-547 (C.A. 2d 1960), the court of appeals held that review of the lawfulness, under the Interstate Commerce Act, of a railroad securities issue could and must proceed simultaneously in the court of appeals and in the Supreme Court.

In addition, a possibility of double review exists whenever there is more than one route to review of an agency order, and such occasions are frequent. Random examples from Maritime Board practice include Montship Lines, Ltd. v. FMB, 295 F. 2d 147 (C.A.D.C. 1961) and Kerr S.S. Co. v. United States, 284 F. 2d 61 (C.A. 2d 1960); and Associated-Banning Co. v. United States, 247 F. 2d 557 (C.A.D.C. 1957), and Howard Terminal v. United States, 239 F. 2d 336 (C.A. 9th 1956). Compare, with respect to ICC orders, the double review in Denver & R.G.W.R. Co. v. Union Pac. R. Co., 351 U.S. 321 (1956); and see Seaboard Airline R. Co. v. Daniel, 333 U.S. 118 (1948); Illinois C.R. Co. v. PUC, 245 U.S. 493 (1918); Armour & Co. v. Louisiana So. Ry., 190 F. 2d 925 (C.A. 5th 1951).

II. IN ANY EVENT, THE EXERCISE OF JURISDICTION BY THE COURT BELOW WAS PROPER IN THE CIRCUMSTANCES OF THIS LITIGATION

The Government concedes that the Court of Appeals had jurisdiction to entertain Flota's challenge to the Commission's reparations order, in the circumstances of this litigation, whatever the ruling on the more general issue discussed above (its brief, pp. 37-43). This alternative basis for jurisdiction (R. 661) is now contested only by Consolo.

When Flota's petition in No. 16,369 was filed, the Court of Appeals already had before it Flota's petition in No. 15,330, for review of the Board's July 1959 finding of violation and Consolo's petition in No. 16,366 for review of the Board's March 1961 reparations order, by which Consolo sought to increase the amount thereof. The jurisdiction of the Court of Appeals to review the petitions in Nos. 15,330 and 16,366 was at no time challenged before the Court of Appeals. It seems beyond question: Hobbs Act, Section 2; *D. L. Piazza* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2d 1954), *cert. denied,* 348 U.S. 839. *Cf. United States* v. *ICC,* 337 U.S. 426.

The underlying controversy was the same in all three cases; substantially the same agency record was involved, "the same parties, the same disputes, the same claims for money damages, and the same statutes".[44] Flota's challenges to the validity of the reparations order were as relevant to Consolo's attempt to increase the award as they were to Flota's attempt to have the award set aside—as was also the lower court's ultimate holding that the Commission abused its discretion in awarding reparations (R. 698). After his initial

[44] United States v. ICC, 337 U.S. at 443.

motion to dismiss or to require Flota to post a bond was held in abeyance, Consolo himself urged that "Flota has chosen to bring its review of the award here, rather than awaiting a suit in District Court" (R. 648), and that "All the facts are before the court, and the controversy is ripe for final decision" (R. 650).

Under these circumstances, an independent basis of jurisdiction to entertain Flota's challenge to the reparations award was not necessary. The doctrine of ancillary jurisdiction and considerations of procedural economy and fairness, for which the Government's brief provides authority,[45] constitute sufficient jurisdictional basis for the lower court's action.

This conclusion follows also from Section 9(a) of the Hobbs Act (5 U.S.C. § 1039(a)), which provides that

> "The court of appeals in which the record on review is filed, on such filing . . . shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."

Once the court's jurisdiction was invoked by Consolo and the record filed, the court below had jurisdiction to determine the validity of the orders in question—whether or not it otherwise would have had jurisdiction.

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[45] See also Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Siler v. Louisville & N.R. Co., 213 U.S. 175 (1909); and Luckenbach Steamship Company v. United States, 179 F. Supp. 605, 614 (Del. 1959), aff'd in part 364 U.S. 280. *Cf.* 1 Barron & Holtzoff, Federal Practice and Procedure 94 (Wright ed. 1960).

Consolo's brief in this Court questions the reasoning of the *Piazza* case, though in reliance thereon he invoked the Court of Appeals' jurisdiction by his own petitions in Nos. 16,366 and 18,230 (R. 491, 634, 676; petition for certiorari, p. 5). There ought to be a limit on the number of times a party can reverse its position in litigation—whether he be a private claimant as Consolo, or the Government, and whether or not the issue is jurisdictional.[46] In any event the answer to Consolo's new position on *Piazza* is that the Hobbs Act coverage was intended to cover all reviewable orders and was not intended to be limited to matters previously subject to three-judge court review (see pages 31, 45-46, *supra*).

III. THE COURT BELOW DID NOT ERR IN VACATING THE COMMISSION'S ORDER

A. The Commission Was Not Compelled Automatically to Award Reparations Following Its 1959 Report

1. Consolo professes to find in the lower court's action "hitherto unknown standards of decision and review" (his brief, p. 30). The first such "standard" is reflected in the lower court's holding in 1962 that the mere fact the Board had found in its 1959 report that "Flota's practices . . . constitute a violation of Sections 14 Fourth and 16 First of the [Shipping] Act" (R. 9-10), did not mean that it was automatically required to grant reparations for the period thereto,

[46] " 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties." Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939); American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932); Baldwin v. Iowa State Traveling Men's Assoc., 283 U.S. 522, 525-26 (1931). See also Angel v. Bullington, 330 U.S. 183 (1947); and Flota's Brief in Opposition to Petition herein, pp. 2-4.

or that "the circumstances of its violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed" (R. 666-67).

On remand the Commission stated its agreement with the court's interpretation (R. 503, 512-13). On further appeal, Consolo raised no issue with respect to the court's earlier holding or the right of the Commission to examine the circumstances of the violation, and did not contend that the Commission did not have discretion to deny reparations, if an award thereof would be inequitable (see Prehearing Stipulation, R. 679-683). He should not now be permitted to raise that issue in this Court. Cf. *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941).

The Government does not join in Consolo's argument. The Government's Memorandum, pp. 10-11, in response to Consolo's petition herein, stated:

> "The rulings below merely recognize that, under Section 22, the direction to pay reparations is discretionary with the Commission. . . . The Interstate Commerce Commission exercises a very similar discretion when it finds that a rate or practice is unreasonable as to the future but not as to the past, and accordingly forbids the practice but denies reparations. We believe that there is no difference in substance . . ."

Consolo's brief (p. 32) acknowledges:

> "We do not, of course, wish to be understood as arguing that the Shipping Act favors inequitable reparation awards."

—though that is the necessary effect of its contention.

The court's holding in any event was correct. The posture of the controversy before the Court of Appeals must be understood. In the 1957-59 phase of the agency proceeding, the evidentiary hearing commenced upon all issues, including reparations. After Consolo has presented virtually his full case, excepting only "a little bit more on the issue of reparations; (R. 122), and prior to the commencement of Flota's case, the Examiner "severed" and deferred testimony on the reparations issues (R. 109-122).

In its 1959 decision the Board found—upon the record containing virtually all of Consolo's testimony in all issues, but not Flota's case on reparations—that Flota's practices "constitute a violation" of Sections 14 and 16 of the Shipping Act. The Board did not state when the violation commenced, vis-a-vis Consolo, or purport to rule upon any aspect of the reparations issue (R. 9-10). Its order stated that the proceedings were to be held open "for further proceedings on the claims of complainants for reparations, if *any* . . ." (R. 13).

Thereafter the supplemental hearings were held and Flota completed its testimony on the reparations issue, including that of its principal officer who testified as to circumstances surrounding both the execution of the 1955 contract, the exercise of Panama Ecuador's option in 1957, and the denial of space to Consolo in 1957 (R. 430-40). However, in its reparations decision thereafter, the Board refused to consider evidence on any issue except "the measure of reparation", and held that the earlier finding of violation precluded Flota from contending that it had not acted unjustly, unfairly or unreasonably insofar as Consolo was concerned, prior to the Board's 1959 ruling (R. 274).

It was in this context that the Court of Appeals held in 1962 that

> "The Board may have erroneously believed (1) that it was required to grant reparations once it had found a violation of the Act, or (2) that all of the issues as to reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding" (R. 666).

and that while the Board could properly find after the first hearing that Flota had violated the Act (R. 667)

> ". . . this does not mean that the circumstances of the violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed" (R. 667).

In *Baer Bros. Mercantile Co.* v. *Denver & R. G. W. R. Co.*, 233 U.S. 479, 486, 488 (1914) this Court declared that

> "awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity to prevent further injury to the public."

It also pointed out that there are cases in which

> "a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is awarded even though a new rate be established for the future. Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co., 20 Inters. Comm. Report 43" (233 U.S. at 488).

Measured against the *Baer Bros.* analysis, it is clear that the Board's 1959 violation finding was in a quasi-legislative capacity, and did not foreclose it on the later reparations record from examining the past conditions, in its quasi-judicial capacity, to determine whether reparations should be awarded. That is the effect of the lower court's holding in this instant case, and the Government's Memorandum above quoted so recognizes.

The lower court employed the word "inequitable" in the same sense as the statute employs the words "unfairly", "unjustly" and "unreasonably". It specifically stated in its 1964 opinion that "The standard of violation has built into it the concepts of fairness and reasonableness; discriminations and preferences are not per se prohibited" (R. 693) and it stressed the importance of the particular "factual setting" of each claim (R. 693).

2. The lower court and the Commission also referred to the discretionary nature of the reparations power vested in the Commission by Section 22 of the Shipping Act, 1916, which is an alternate justification for its holding (R. 503, 666, 690-91, 698). Section 22 provides only that the Commission shall issue such order "as it deems proper", and "may" award reparations (46 U.S.C. § 821). Considerations of "fairness" and "justice" have long been found to require the withholding of damages or reparations under the Interstate Commerce Act, particularly where, as here, the claimed reparations period is prior to enunciation of a new rule of law or standard of conduct and there-

fore involves retroactivity.[47] The relevance of such considerations has been recognized under the National Labor Relations Act,[48] the Securities and Exchange Act,[49] and in a variety of other situations.[50]

B. The Court Properly Found That The Commission's Award Was Not Supported by Substantial Evidence

1. Consolo's final contention is that the court below made its "own findings of fact" contrary to the Commission's findings, and therefore applied an "improper standard for review".

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[47] Johnson Seed Co. v. United States, 90 F. Supp. 358 (W.D. Okla., 1950), aff'd 191 F. 2d 228 (C.A. 10th, 1951); Delaware, Lackawanna & Western Coal Co. v. R.R. Co., 46 I.C.C. 506, 509 (1917); West Coast Lumbermen's Assoc. v. A. & S. Ry. Co., 104 I.C.C. 695, 702 (1925); Boston Wool Trade Assoc. v. Director General, 69 I.C.C. 282, 309 (1922); Anadarko Cotton Oil Co. v. A.T. & S.F. Ry. Co., 20 I.C.C. 43, 50 (1910). See also Detroit, G.H. & M. Ry. Co. v. Interstate Commerce Com'n., 74 Fed. 803, 822-23 (C.C.A. 6th, 1896). Cf., Baer Bros. Mercantile Co. v. Denver & R.G.W.R. Co., 233 U.S. 479, 486 (1914).

[48] E.g., 29 U.S.C. § 160(c), and Phelps Dodge Corporation v. NLRB, 313 U.S. 177, 198 (1941) ("The remedy of back pay, it must be remembered is entrusted to the Board's discretion; it is not mechanically compelled by the Act.")

[49] Securities and Exchange Com'n., v. Chenery Corp., 332 U.S. 194, 203 (1947). ("... such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or the legal or equitable principles.")

[50] Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370 (1932); Gelpcke v. Dubuque, 68 U.S. 175 (1894); Douglass v. Pike County, 101 U.S. 677 (1880); 15 U.S.C.A. § 71s(a); and 26 U.S.C.A. § 7805(b). See also Leedom v. International Brotherhood of Elec. Wkrs., 278 F. 2d 237 (C.A.D.C. 1960); and Simpson v. Union Oil Co., 377 U.S. 13, 24, 25 (1964). ("We reserve the question whether when all the facts are known there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today.")

The Court of Appeals' 1964 decision was that the Commission on remand had "ignored the guideposts of our original decision" (R. 689), had "ignored . . . the substantial weight of the evidence before it" (*ibid.*), and had "abused" its discretion (R. 698). There is in the Court's action no departure from the normal standards of review.

The case was before the Court of Appeals not once, but twice, and each time was thoroughly briefed and argued by the Government, Consolo and Flota. That court's opinions evidenced painstaking review, and an intimate familiarity with the record. In its first opinion (R. 651-67), the court declined to rule upon the ultimate reparations issue, and instead remanded the case to the Commission (R. 666-67). It held, however, that Flota had "marshalled substantial evidence in support of its contention" that it should not be compelled to pay reparations for the period prior to the Board's July 1959 decision, and then proceeded to consider and discuss a number of points in issue, establishing guideposts for future consideration by the Commission (R. 665-67, 668-89).

On remand the Commission's report—written by its attorneys[51] who had previously appeared as advocates against Flota (R. 480-84, 492, 526-27)—disregarded the guideposts established by the Court and, incredibly, did not even mention the court's earlier finding of "substantial evidence" supporting Flota's good faith.

In its second opinion thereafter, the court stated that it had hoped further consideration by the Com-

[51] Flota contends that their participation in the formulation and writing of the Commission's remand opinion was highly improper and unlawful, a contention upon which the Court of Appeals found it unnecessary to rule (R. 698). See pp. 65-66, *infra*.

mission "would throw light on our initial impressions"; and that it had been "prepared to affirm the Commission if it could establish that the circumstances were such as to not make it unfair to assess damages against Flota" (R. 688-89); but that "careful examination of [the Commission's] opinion, the evidence relied upon by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignored not only the guideposts of our original decision, but also the substantial weight of the evidence before it" (R. 689). The court thus expressed its conclusion that upon the record as a whole, there was lacking substantial evidence to support the Commission's findings and order. This conclusion was not a departure from the "substantial evidence" rule but merely an application of it.

In explanation of its conclusion, the court then discussed the individual facets of the controversy, in great detail (R. 689-98). The court's discussion was a demonstration of the error of the Commission's findings and reasoning in support of the court's conclusion that the Commission had ignored the substantial weight of the evidence before it, and was not *de novo* fact finding, as Consolo suggests.

In that discussion the court stated that "an objective and rational examination of all the evidence reveals such equitable factors . . ." that "make reparations an inappropriate remedy in this case"; that it was unable to find a basis for the Commission's new and belated challenge to Flota's "good faith"; that Flota had acted with "substantial justification"; that the law was "unsettled" during the period in question; that Flota had acted as "promptly as possible" and that there was "no evidence Flota in any way benefitted by its exclusion of Consolo"; that the latter bore, at

most, only the loss of "speculative" and "unrealized" profits (R. 690, 698).

Having thus demonstrated in detail the lack of basis for the Commission's findings on remand, the court concluded:

> "In view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act in imposing reparations on petitioner." (R. 698).

The Court below did not regard the question, as Consolo says, as "whether there is substantial evidence showing the contrary of what the agency did" (Consolo's brief, pp. 38-39) The court below recognized, by its very act of remand in 1962, that the question was not merely the substantiality of evidence supporting Flota's contention. The question put by Consolo, "whether there is a basis in the record for what the agency *did* find", was answered in the court's second opinion—in the negative (R. 687-98). The court thus acted with complete propriety and wholly within traditional limitations of review of administrative agency action.[52]

The foregoing answers Consolo's contention and should end this Court's inquiry. Consolo expressly

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[52] Section 10(e), Administrative Procedure Act, 5 U.S.C. § 1009 (e); Universal Camera Corp. v. National L.R. Bd., 340 U.S. 474 (1951) (on remand see 190 F.2d 420); NLRB v. News Syndicate Co., 365 U.S. 695 (1961); Federal Trade Com. v. Standard Oil Co., 355 U.S. 396 (1958); Hall v. Celebrezze, 314 F.2d 686 (C.A. 6th 1963); Celanese Corporation of America v. N.L.R.B., 291 F.2d 224 (C.A. 7th 1961), cert. denied, 368 U.S. 925; Local No. 3, etc. v. NLRB, 210 F.2d 325 (C.A. 8th 1954), cert. denied, 348 U.S. 822.

states that he is "not expecting this Court to review the evidence" (his brief, p. 37, n. 13).

2. The Government, however, appears to have reversed its position once again. It opposed the petition for writ of certiorari, except as to the jurisdictional issue, in its Memorandum of May 1965 (pp. 10-13), and there stated that "We do not believe that further review of the other questions presented by the petition is necessary at the present time", and that "The instant case . . . does not present the 'rare instance' calling for this Court's intervention to correct a gross misapplication of the standard governing review of agency findings". Even in its brief to this Court, the Government recognizes that the remaining issue is essentially a private damages claim, and states "we leave the argument on the merits of the Court of Appeals result to be made principally by petitioner" (its brief, p. 44). Then despite these disclaimers—and despite the fact that Consolo does not ask the Court to review the evidence—the Government's brief proceeds for eight pages to attack the merits of the Court of Appeals judgment, and Flota's good faith in the 1957-1959 claimed reparations period.

Answer may be found in the Government's own May 1965 Memorandum, p. 12:

> "In the circumstances of the present case, however, the reviewing court's redetermination of the equities did not involve a flagrant disregard of the limitations of review. Its decision was inextricably intertwined with its conclusion as to the unsettled nature of the law at the time of Flota's violation; it believed that the Commission erred in ruling that there could have been confusion as to the guiding rules. On this purely legal issue, the Commission's determination was entitled to less deference than on other matters."

—concluding that this Court's intervention was unnecessary.

It was held in *NLRB* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 502, 503 (1951):

> "The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeal involving solely a fair assessment of the record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such fair assessment when the case is here, as this is, on other legal issues."

This rule has been applied in cases in which a Court of Appeals has reversed the agency's conclusions of fact on "good faith" issues, such as here involved. *Federal Trade Com.* v. *Standard Oil Co.,* 355 U.S. 396 (1958); *NLRB* v. *American National Insurance Company,* 343 U.S. 395, 410 (1952). The circumstances and findings recited above, the court's restraint in remanding to the Commission in 1962, its careful answers to the arguments contained in the Commission's report on remand, the very attention to detail manifested in its opinion, all established that it made a "fair assessment" of the record. *NLRB* v. *Pittsburgh Steamship Company, supra.*[53]

The Government's factual arguments with one exception, were twice presented to the Court of Appeals,

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[53] The fact that the key factual issue here is Flota's "good faith", makes familiarity with the entire record absolutely essential to a just result. However, there is an inherent impossibility in a case of the factual complexity of this one, where the major preoccupation is with intricate jurisdiction issues, of adequately dealing with the factual record. These considerations provide additional reasons for the Court here to decline to review the factual record.

carefully examined by it, and rejected. That single exception appears at page 47 of the Government's brief where it argues that Flota had an opportunity to cancel its contract with Panama Ecuador in 1958. This is a discredited and abandoned Consolo argument, which even the authors of the Commission's report on remand rejected. No mention of it appears in the Commission's report (R. 501-14). Any matter relating to events prior to August 23, 1957 may also be disregarded, for it was held by the Board and Court of Appeals that Flota violated no duty owed to Consolo prior to that date (R. 277-78, 663).

The heart of the critical "good faith" issue[54] revolves around whether the law was "settled" or "unsettled" in the 1957-59 reparations period—an issue as to which the Commission can lay no claim to special competence. In this connection, at pp. 4-5, and pp. 44-45 the Government's brief states that the Board in June 1953 had "made a study of banana carriage in depth and had held that . . . a carrier could not pick and choose among qualified banana shippers", *Consolo* v. *Grace Line Inc.*, 4 F.M.B. 293 (1953); and that the Board "reaffirmed" the 1953 decision in *Banana Distributors Inc.* v. *Grace Line Inc.*, 5 F.M.B. 278, on April 29, 1957.

The lower court discussed these cases in detail at R. 691-696, especially at R. 691-692—which discussion the Government's brief ignores. The fact is that the 1953 proceeding was a private complaint case not involving

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[54] The Government advised the lower court, "Whether it is equitable to award reparations to Consolo depends upon the persuasiveness of Flota's protestations of good faith". Brief on Behalf of Respondents, On Petition for Review of Order of the Federal Maritime Commission, submitted to the Court of Appeals in March 1964, in case Nos. 18,230 and 18,235, p. 19; see also pp. 9, 11. A true copy of this brief has been lodged with the Clerk of this Court.

either Flota or the industry generally, as the Court might infer. Moreover it never proceeded to a final order, was settled on terms of which the Commission was aware, but which were substantially at variance with its report; and was so little regarded as a precedent that instead of being "reaffirmed" in the Board's 1957 opinion, it was not even mentioned therein—except upon a minor point not here relevant. Further, Flota's problem until it finally entered into a contract with Panama Ecuador in 1955—after advertisements to which no one responded—was finding *any* shipper for its reefer space, not in picking and choosing between shippers. (R. 77-82).

As to the 1957 decision—which like the 1953 report was contrary to lay standing practice—there was no final disposition until August 20, 1957, long after Panama Ecuador had exercised its renewal option and the renewal contract had been executed (R. 187-91, 195-99, 430-38, 442); and thereafter the 1957 decision was *reversed* by the Court of Appeals for the Second Circuit in *Grace Line Inc.* v. *FMB,* 263 F. 2d 709 (C.A. 2d 1959).[55] The Board in its first reparations decision said Flota should have accepted the Board's decision, but did not even mention the reversal (R. 276). And the Commission's second reparations report, written by Flota's adversaries on its staff, terms both the 1953 and 1957 reports as "authoritative pronouncements" (R. 505). Yet the Government charges *Flota* with lack of "good faith", and the

[55] A supplemental Board report, 5 F.M.B. 615 (1959), was affirmed, 280 F.2d 790 (C.A. 2d 1960), *cert. denied,* 364 U.S. 933, long after the reparations period here in question. As the court below found, "Flota's counsel had good grounds for believing that the [1957] Grace Line report, even if valid and binding, did not cover Flota's situation and did not require abrogation of the Panama Ecuador contract" (R. 693; see 690-97).

Court of Appeals with invading the Commission's discretion. With such a performance spread on the record before it, the Court of Appeals could not reasonably have done anything other than it did.[56]

C. There Are Additional Issues Upon Which The Judgment Below May Be Sustained

There were additional issues before the Court of Appeals, which it found unnecessary to consider. That they are issues of substance is shown by the following:[57]

1. *Improper commingling of advocacy and advisory or decisional functions.* The Commission's own minutes disclose that its General Counsel and Assistant General Counsel, Messrs. Pimper and Mitchell, having previously acted as advocates against Flota (R. 480-84, 492, 651), thereafter intimately participated and advised in the Commission's deliberations in the remanded proceeding Acting *ex parte,* without notice to Flota or opportunity to object or except, they formulated the Commission's findings, and submitted a proposed report and order which the Commission adopted verbatim (R. 524-27). It is Flota's contention, upon which the lower court found it unnecessary to rule (R. 698), that the Commission thereby violated constitutional and statutory prohibitions against commingling advocacy and decisional functions in the

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[56] As to the Government's argument, (pp. 3-5), twice made to and twice rejected by the court below, that Flota delayed the Board proceeding, the Government persists in confusing Flota's efforts to obtain action on its own petition for declaratory order separately from the complicated reparations issues in Consolo's complaints. See R. 49-51, 55-56, 60-62. The Court of Appeals comments are at R. 665-66, 697. The Government at p. 45, note 34 of its brief, quotes Flota's trial counsel out of context (R. 134).

[57] There are undecided questions also as to subsidiary issues involving principally the calculation of damages (R. 667, n. 19; 672-75).

same persons.[58] The procedure employed neither the substance nor the appearance of fairness.

2. *Measure of Damages.* The Commission applied a "measure of damages" based on "refusal to carry" cases, *i.e.,* actions involving breach of the common law obligation of a common carrier "to transport goods duly tendered for carriage", or a statutory codification thereof. But the violations for which reparations are sought are purely statutory violations, of Sections 14 Fourth and 16 First, Shipping Act, 1916, the essence of which is discrimination between shippers.[59] The Court held in *ICC* v. *United States,* 289 U.S. 385, 389-90, 393 (1933) that

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper (citing cases . . .). The question is not how much better off the complainant would be today if it had paid a lower rate. *The question is how much worse off it is because others have paid less.*"

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[58] See Morgan v. United States, 304 U.S. 1, 19-20 (1938); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Amos Treat & Co. v. Securities and Exchange Commission, 113 App. D.C. 100, 306 F.2d 260 (1962); Trans World Airlines v. Civil Aeronautics Board, 102 App. D.C. 391, 254 F.2d 90, 91 (1958); Administrative Procedure Act, Section 5(c) (5 U.S.C. § 1004(c) and Section 8(b) (5 U.S.C. § 1007(b)); Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 56.

[59] Contrary to Consolo's implication, brief pp. 13-14, 33-35, it has never been held that Flota violated any common law duty to Consolo, if a cause of action for discrimination existed prior to 1916 and survived, which is highly doubtful. See Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184, 200-201 (1913); T. I. M. E. v. United States, 359 U.S. 464, 473-74 (1959). The court in Grace Line v. FMB, 280 F.2d 790, 792 (C.A. 2d 1960), cert. denied, 364 U.S. 933, assumed *arguendo* that the carrier there did *not* owe a common law duty to banana shippers.

The case involved discrimination in rates but its reasoning is equally applicable where the discrimination is in service.

Here the Commission should have inquired "not how much better off [Consolo] would have been today if it had" received space from Flota, but "how much worse off" he is because his (alleged) competitor Panama Ecuador used the space. The loss of profits from an anticipated expansion in business by Consolo is not within this rule.

In its 1962 opinion, the court referred to the measure of damages employed by the Board and later by the Commission as "relatively harsh"; in its 1964 decision, it referred to Consolo's claimed damages as the loss of "speculative" and "unrealized" profits. (R. 690, 698).

Flota believes the foregoing constitute sufficient alternative grounds for sustaining the lower court's action. However, if the resolution of these issues becomes necessary, it may be more appropriate for this Court to remand the case to the Court of Appeals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 *et seq.*:

Section 22 (46 U.S.C. 821):

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

* * * * *

Section 29 (46 U.S.C. 828):

In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Section 30 (46 U.S.C. 829):

In case of violation of any order of the Federal Maritime Board for the payment of money the person to

whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Section 31 (46 U.S.C. 830):

> The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

The Administrative Orders Review Act (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 *et seq.:*

Section 2 (5 U.S.C. 1032):

> The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended * * * as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 * * * .

Section 3 (5 U.S.C. 1033):

> The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

Section 8 (5 U.S.C. 1038):

> * * * The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is

not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. * * *

Section 9(a) (5 U.S.C. 1039(a)):

Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

The Hepburn Act of 1906, 34 Stat. 584 *et seq.*:

Section 5 (34 Stat. 590-92):

That section sixteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"SEC. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the

United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequnet stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided,* That claims accrued prior to the passage of this Act may be presented within one year.

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of

any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

"Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

"It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission

may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

"From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

"The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of 'An Act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided,* That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not

less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further,* That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

"The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals."

The Mann-Elkins or Commerce Court Act of 1910, 36 Stat. 539 *et seq.:*

Section 1 (36 Stat. 539):

That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or pen-

alty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * *

Section 3 (36 Stat. 5342-43):

That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

* * * * *

The Judiciary Act of 1911, 36 Stat. 1087 *et seq.*, 28 U.S.C. Section 1336:

Section 24 (36 Stat. 1091-92):

The district courts shall have jurisdiction as follows:

* * * * *

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

* * * * *

Section 207 (36 Stat. 1148-49):

The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the

judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * *

Section 208 (36 Stat. 1149):

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. * * *

Section 209 (36 Stat. 1149-50):

The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy

thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States.

Section 211 (36 Stat. 1150):

All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

Section 213 (36 Stat. 1151):

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

The Urgent Deficiencies Act of 1913, 38 Stat. 208, 219, 220:

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and te[illegible] is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter

covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court.

* * * * *

The Judicial Code, 28 U.S.C. 1 *et seq.:*

Section 1336:

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

* * * * *

The Administrative Procedure Act of 1950, 60 Stat. 237 *et seq.*, 5 U.S.C. § 1001 *et seq.:*

Section 10 (60 Stat. 243):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.